

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 10,468

BRIEF OF APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

150

BENNETT E. MEYERS, *Appellant*,

VS.

DONALD CLEMMER, Director, Department of Corrections,
District of Columbia, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
For the
District of Columbia Circuit

FILED DEC 21 1949

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10.468

BENNETT E. MEYERS, *Appellant*,

vs.

DONALD CLEMMER, Director, Department of Corrections,
District of Columbia, *Appellee*.

BRIEF OF APPELLANT

I

Preliminary Statement

On the 5th day of October, 1949, Appellant herein filed a Petition for writ of *Habeas Corpus* to the United States District Court for the District of Columbia, (App. 2A *et seq.*).

On the 24th day of October, 1949, the lower court dismissed said petition, (App. 13A).

From the Order of Dismissal referred to above, appeal was taken to this Court.

As more fully appears from the Petition for Writ of *Habeas Corpus* herein, (App. 2A *et seq.*), Appellant was tried for the crime of subornation of perjury before the United States District Court for the District of Columbia,

and, having been found guilty of the offense charged, a judgment was rendered against him on March 12, 1948 and he was sentenced to imprisonment for a term of twenty (20) months to five (5) years under Section 2501 of Title 22 of the District of Columbia Code, being committed then to the District of Columbia Jail in Washington, D. C. and, subsequently, transferred to the District of Columbia Reformatory, at Lorton, Virginia. At the time of the hearing on October 21, 1949, before the lower court; upon a Rule to Show Cause why the Petition for writ of *Habeas Corpus* should not be granted, Appellant was confined and being restrained of his liberty in the District of Columbia, being present in the Court Room at the hearing as aforesaid. The Petition for Writ of *Habeas Corpus*, the dismissal of which is the subject of this appeal, was filed under Chapter 8, Section 16-801 of the District of Columbia Code.

Prior to the time of the filing of the Petition for Writ of *Habeas Corpus*, Appellant had filed in the sentencing court, i.e., the United States District Court for the District of Columbia, a Motion to Vacate Sentence under Section 2255 of Title 28 of the United States Code, which motion was denied by that Court on the 22nd day of July, 1949. Appeal from the action of the United States District Court for the District of Columbia, in denying the Motion to Vacate Sentence was taken to this Court, where it is now pending, (*Bennett E. Meyers v. United States of America*, No. 10,367 in this Court).

II

The Question Presented

The question presented is whether or not Section 2255 of Title 28 of the United States Code applies to a *habeas corpus* proceeding brought under Chapter 8, Section 16-801 of the District of Columbia Code and, if so, whether or not the lower court erred in holding that the remedy

afforded Appellant by Motion to Vacate Sentence was adequate to test the validity of his detention.

III

The Lower Court Erred in Dismissing the Petition For Writ of Habeas Corpus

The grounds for dismissal stated by the Court, in its Order, (App. 13A), was that, as Appellant had theretofore applied to that Court under the provisions of Section 2255, Title 28 of the United States Code, to set aside and vacate the judgment of conviction and that as it was not alleged nor, according to the Court, did it appear that the remedy by motion to vacate sentence was inadequate or ineffective to test the legality of his detention, the Petition for Writ of *Habeas Corpus* did not lie.

Relief was sought by Appellant, in the lower court, by Petition for Writ of *Habeas Corpus* under the provisions of Chapter 8, Section 16-801 of the District of Columbia Code, the ground for such petition being, among others of importance, that at his trial, his Constitutional right to trial by Jury had been violated by the trial court in failing and in refusing to permit the jury to pass upon all the factual elements of the crime of which he was charged. (See Petition for Writ of *Habeas Corpus*, (App. 2A *et seq.*).

The lower court, in dismissing the Petition for Writ of *Habeas Corpus*, stated, from the Bench, (App. 24A *et seq.*), that as Title 28 of the United States Code was an Act of Congress of general application, it affected and applied as well to the District of Columbia, the lower Court, and to the Code of Laws of the District of Columbia as elsewhere and that this being so, unless it were the fact and shown to be the fact, that the remedy available to Appellant by a motion to vacate sentence under Section 2255 of Title 28 of the United States Code was inadequate or ineffective to test the legality of his detention, the Appellant was foreclosed from applying to the United States

District Court for the District of Columbia under the subject-provision of the District of Columbia Code for relief by *habeas corpus*. The Court, (App. 25A, 26A), in the course of its opinion from the Bench, stated that as it felt that the remedy by motion to vacate sentence was adequate to test the validity of Appellant's detention,

"the present application is barred under that statute",

and that

"I think this Court has lost jurisdiction to deal with the matter. * * *"

The question which is presented to this Court in this appeal and which is to be resolved, is whether or not Section 2255 of Title 28 of the United States Code, Judiciary and Judicial Procedure, which became effective September 1, 1948, has application to and controls the procedural steps provided for and available to persons restrained of their liberty, when recourse is had by them by *habeas corpus* under Chapter 8, Section 16-801 of the District of Columbia Code. As has been indicated, the *habeas corpus* judge was of opinion that the United States Code, being a statute of general application, was applicable to a *habeas corpus* proceeding instituted under the District of Columbia Code of Laws; whereas, it is the contention of Appellant that this is not the case.

Title 28 of the United States Code, effective September 1, 1948, repealed certain laws and parts of laws by specific enactment in this respect. The Court will find that Chapter 8, Section 16-801 of the District of Columbia Code was not repealed by the enactment of Title 28 of the United States Code.

It is axiomatic that penal statutes are to be strictly construed in favor of persons affected by them. It is also clear that where a statute specifically repeals certain other earlier enacted statutes, it does not repeal any stat-

ute not so specified unless the latter statute is diametrically opposed to and in conflict with earlier enacted statutes.

Moreover, the District of Columbia Code of Laws exists separately from the Federal or United States Code of Laws and cannot be said to have been amended or repealed by strictly Federal enactments which do not even purport to affect this separate body of statutory law. *Griffith v. United States*, 93 L. Ed. 785; *Johnson v. United States*, 225 U. S. 405, 56 L. Ed. 1142. In the latter case, the Supreme Court of the United States said:

“There is no inconsistency of superseding or repealing effect by the Code of the District and the Criminal Code, regarding the latter as an Act of Congress passed after the District Code. Having definite territorial operation, they can exist together. And, as said by the Court of Appeals, a cogent reason for the conclusion that they were intended to exist together is found in the repealing provisions of the Criminal Code, which, in Chapter 15, enumerates in detail the provisions repealed, and no reference is made to the District Code.”

Moreover, the Court should note that the *habeas corpus* judge, Honorable Alexander Holtzoff, who dismissed the subject-petition for *habeas corpus*, is the same judge who denied Appellant's Motion to Vacate Sentence under Section 2255 of Title 28 of the United States Code and who, in the course of his opinion, pronounced from the Bench, in that case, that *he had lost jurisdiction over the criminal case, i.e., United States of America v. Bennett E. Meyers*, No. 1414-47, (App. Rec. in that case No. 10367 in this Court p. 435) in which case the motion to vacate sentence had necessarily been filed. In this, the *habeas corpus* judge's view of the matter, it is patent that the remedy available to Appellant by motion to vacate sentence *was* inadequate and ineffective to test the validity of his detention. Further, in the *habeas corpus* judge's opinion from the Bench in the present case, as has been

indicated, he reiterated that he had "lost jurisdiction to deal with the matter."

It is true that the United States District Court for the District of Columbia is one of the United States District Courts to which, in general, the provisions of Title 28 of the United States Code, Judiciary and Judicial Procedure, apply; but it is also true that the Congress, when it enacted Section 2255 of Title 28 of the United States Code, was aware of Chapter 8, Section 16-801 of the District of Columbia Code, and that if it had been the desire or intention of Congress to apply to *habeas corpus* proceedings in the District of Columbia, the restrictive provisions of Section 2255 of Title 28 of the United States Code, it would have repealed Section 16-801 of Chapter 8 of the District of Columbia Code, as it did amend the parallel provisions of the United States Code, as they existed prior to September 1, 1948.

It is the position of Appellant that Section 2255 of Title 28 of the United States Code does not amend or supersede the *habeas corpus* provision of the District of Columbia Code and that this being so, the lower court erred in dismissing the Petition for Writ of *Habeas Corpus* upon the ground that such would not lie in purview of Section 2255 of Title 28 of the United States Code.

CONCLUSION

It is respectfully submitted that the lower court erred in dismissing the Petition for Writ of *Habeas Corpus* and that this Court should reverse that decision and remand the case to the lower court in order that the Petition for *Habeas Corpus* may be considered upon its merits by that Court.

STANLEY SUYDAM,

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Attorneys for Appellant.

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Of Counsel.

APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,468

BENNETT E. MEYERS, *Appellant*,

vs.

DONALD CLEMMER, Director, Department of Corrections,
District of Columbia, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

19 Filed Oct 5 1949 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Bennett E. Meyers, Petitioner,

v.

Donald Clemmer, Director, Department of Corrections,
District of Columbia, Room 3144, New Municipal Cen-
ter Building, Washington, D. C., Respondent.

Habeas Corpus No. 3587

*Petition for a Writ of Habeas Corpus to Honorable Bolitha
J. Laws, Chief Judge, United States District Court
for the District of Columbia*

1. Petitioner is a citizen of the United States and a
resident of the State of New York.

2. Respondent is a citizen of the United States, is a
resident of the District of Columbia, and is the Director of
the Department of Corrections for the District of Colum-
bia, with offices at Room 3144, New Municipal Center
Building, Washington, D. C.

3. Petitioner is now in prison and illegally deprived
of his liberty by Respondent.

4. The cause or pretense of such illegal imprisonment
and restraint of Petitioner is a judgment rendered and
entered on the 12th day of March, 1948 in the District
Court of the United States for the District of Columbia,
whereby said Petitioner was found guilty of subornation
of perjury under Title 22, Section 2501 of the District of
Columbia Code. The indictment upon which said judg-
ment was entered alleged that the perjury which it was
claimed Petitioner had suborned had been given by one

20 Lamarre on October 4, 1947 and October 6, 1947
before a Subcommittee of the Special Senate Com-
mittee to Investigate the National Defense Program.
The indictment alleged that the said Subcommittee had

been created by the Special Senate Committee and specifically relied upon the alleged subcommittee as the competent tribunal before which the perjury claimed had been given. The indictment was in three counts, alleging in each of the three counts, that the perjury had been given before the Senate Subcommittee as a competent tribunal on October 4, 1947 and on October 6, 1947, without distinction between the two dates. On March 15, 1948 Petitioner was sentenced to imprisonment for a term of twenty months to five years. His motion for bail, pending appeal, being denied by the Trial Judge, he was forthwith committed to the District of Columbia Jail in Washington, D. C., subsequently transferred to the District of Columbia Reformatory at Lorton, Virginia, where he has since remained and now is.

5. Petitioner's appeal from the judgment of the District Court of the United States for the District of Columbia was dismissed by the United States Court of Appeals for the District of Columbia on November 8, 1948. 171 Fed. (2d) 800. Petitioner's application for a *writ of certiorari* was denied by the Supreme Court of the United States on February 14, 1949.

6. Following the decision of the Supreme Court of the United States in *Christoffel, Petitioner v. The United States*, (decided June 27, 1949, 93 L. Ed. 1349), Petitioner filed a motion in the United States District Court for the District of Columbia under provisions of United States Code, Title 28, Section 2255, to vacate and set aside the judgment and to discharge defendant from custody. This motion was heard on July 22, 1949 by the same District Court Judge who had presided at Petitioner's trial, had imposed the sentence, and had denied Petitioner bail pending his appeal. The motion was then and there denied.

21 7. Petitioner's imprisonment and restraint are illegal, and the judgment and commitment are void, because—

(a) Petitioner, at his trial, was deprived of the right to a judgment of acquittal when there was utter failure of proof of an essential element of the crime charged against him.

(b) Petitioner, at his trial, was deprived of his Constitutional right to have the jury pass upon a question of fact relating to an essential element of the crime charged against him.

(c) Petitioner did not receive at his trial, and has not yet received, the benefit of the same rules of law with respect to the competency of the tribunal as laid down in *Christoffel, Petitioner v. The United States of America*.

(d) Petitioner has been deprived of his Constitutional right to equal protection of the laws of the United States, in that a different rule of law has been applied by the courts below to the indictment against him than has been applied in the case of *Christoffel, Petitioner v. The United States of America*.

(e) Petitioner has been deprived of his Constitutional rights to due process of law for the reason that discrimination has been practiced against him and different rules of law have been applied to his case than those applied in *Christoffel, Petitioner v. The United States of America*.

(f) A greater error was committed by the Trial Judge in his charge to the Jury in Petitioner's case than that which resulted in the reversal of the judgment by the Supreme Court of the United States in *Christoffel, Petitioner v. The United States of America*.

(g) Under the law declared by the Supreme Court of the United States in *Christoffel, Petitioner v. The United States of America*, Petitioner, at his trial, was entitled to a judgment of acquittal at the close of the evidence.

(h) The indictment in this case charges in each count upon which defendant was convicted, that Lamarre committed perjury on October 4, 1947 and October 6, 1947, without distinction between the two dates.

22 (i) Evidence was admitted as to statements by Lamarre on October 6, 1947 under the guise that

they were perjured statements in support of the charges in the indictment.

(j) Admittedly and concededly, there was no competent tribunal on October 6, 1947, there being a complete absence of a quorum on any theory.

(k) The admission of evidence of alleged perjury by Lamarre on October 6, 1947 was a prejudicial error and a denial to the defendant of due process of law.

(l) The action of the Trial Court in refusing to permit the Jury to decide a material *issue of fact* ousted the Trial Court of jurisdiction and its judgment is *void*.

8. At Petitioner's trial, the Trial Judge committed the same error as that which caused the reversal in the *Christoffel* case, except that in Petitioner's case the erroneous rulings of law with respect to competency of the tribunal were carried further than in the *Christoffel* case.

In the *Christoffel* case the Trial Judge did treat the question of the competency of the tribunal as a question of fact for the Jury, but the Supreme Court has held that the same was erroneous, in that "the jury was allowed to assume that the conditions of competency were satisfied even though the basis in fact was not established and in face of a possible finding that the facts contradicted the assumption." (17 LW 4630).

At the trial of the defendant Meyers the Trial Judge's view of the law was that a defendant could not even raise the question of the existence of a quorum of the alleged subcommittee, ruling that:

"The only person who can raise the objection to no quorum present is one of the persons actually present . . . unless some member present raises the objection that there is no quorum, no one else may raise that objection and the proceedings are valid."

23 The above statement of law applied by the Trial Judge to the defendant Meyers was made in the course of denial of defendant's request for instructions to the Jury, Nos. 51 and 52, (see pages 360 and 361 of

"Appendix for Appellant" in the case of *Bennett E. Meyers, Appellant v. United States of America, Appellee*, No. 9797, on file in that case in the Office of the Clerk of the United States Court of Appeals for the District of Columbia.

9. *Certiorari* was granted on and conviction of *Christoffel* set aside on the same point relative to the competency of the tribunal that petitioner Meyers had insisted upon, (among other important points), at his trial, on his appeal, and in his petition for *certiorari* to the Supreme Court of the United States.

10. Petitioner's case is clearly and succinctly stated by Mr. Justice Jackson in footnote 4 in his dissenting opinion in the *Christoffel* case as follows:

"In *Meyers v. United States*, 171 F. 2d 800, *certiorari* denied 336 U. S. 912, the petitioner was convicted of subornation of perjury committed before a committee of Congress on two separate days—October 4 and October 6. The conviction was allowed to stand despite a charge to the jury that the quorum on October 4 was presumed to continue unless and until a committee member raised the point of no quorum, and that false testimony given before the points raised is perjurious under this same statute. That charge is practically identical with the charge given in this case, of which this Court now says 'The heart of this case is that by the charge that was given it the jury was allowed to assume that the condition of competency was satisfied even though the basis in fact was not established and in face of a possible finding that the facts contradicted the assumption.' This perfectly describes the Meyers case, considering only the October 4th testimony, on which it is said the conviction rested. Considering only that part of each count, Meyers was convicted and is now imprisoned for suborning perjury given under identical conditions as did Christoffel; and Meyers' guilt was determined by a jury which received the same ruling the Court now holds to be error as applied to Christoffel. Yet

24 the Meyers conviction was affirmed and we denied his plea for review. Such a denial here of course does not imply approval of the law announced below but, on the undisputed facts, Meyers' conviction rests on a basis which this Court says is 'unthinkable' as to Christoffel whose conviction is reversed.

"Moreover, the Meyers jury was permitted to convict partly at least on the basis of testimony given before a Committee on October 6 when the *committee records showed, and the Government admits, that no quorum was present at any time*. Today's opinion is diametrically opposed to the Meyers conviction based on the October 4th testimony alone, but the Meyers conviction also rests in part on testimony before a body which demonstrably and admittedly *never* amounted to a quorum, while Christoffel's is reversed merely because the charge permitted the jury to ignore oral testimony 'indicating' that a quorum once admittedly established may have evaporated. I do not see how the Court can justify such discrimination. The court below evidently could not, for it relied on the Meyers case as a precedent for affirming the conviction of Christoffel on this identical issue." (*Christoffel v. United States*, 17 LW 4628, footnote 4, p. 4631).

Thus, with respect to the essential element in a charge of perjury, namely, the competency of the tribunal, the position of the two courts below in petitioner's case was as follows:

(a) The District Court held that Petitioner, as a defendant, could not raise the point at all and entered a judgment, which included a day in which there was admittedly no quorum. The District Judge further refused to give the Jury any instructions on the point. It was not a question of fact, he held.

(b) The Court of Appeals admitted that there could be no competent tribunal in the absence of a quorum and therefore, that there could be no conviction based upon testimony of October 6, 1947. From there, however, *it*

proceeded to pass upon a question of fact which had been withheld by the trial judge from the jury and stated that "practically all Lamarre's testimony was given on October 4 when a quorum was present." (Italics ours)

Thus, an appellate court assumed the function of a jury, and, in a two-to-one opinion, upheld Petitioner's conviction by deciding for itself a question of fact
25 as to the existence of a quorum on October 4.

11. Petitioner Meyers has been the victim of illegal, unjust, and discriminatory treatment by the courts from the commencement of the proceedings against him to the present time. Petitioner, raising precisely the same point, (in addition to others of importance), was denied bail pending appeal in the District Court and twice in the Court of Appeals. *Christoffel's* conviction was set aside and Christoffel was allowed his freedom pending appeal and, of course, subsequent to the reversal of the judgment against him, the principle of law laid down by the *Christoffel* case is the law of the land and the courts have thus far refused to apply that law to Petitioner Meyers, with the result that Christoffel is free and Meyers is in prison.

12. The United States District Court for the District of Columbia has utterly failed and refused to apply the law laid down in the *Christoffel* case to the Petitioner Meyers. The following took place at the hearing in the District Court on July 22, 1949. (T. R. p.p. 13, 14), and illustrates the travesty of judicial process to which this Petitioner has been subjected:

"THE COURT: Well, you are referring to some instructions to the jury, but there was no evidence offered in behalf of the defendant in the Meyers case raising that issue, or controverting the Government's contention that a quorum was there, and I did hold that the issue was irrelevant, but it is also a fact that no evidence was tendered on that by the defendant.

"MR. BUSHNELL: Your Honor flatly refused to instruct the jury that it was an essential element in the Meyers case.

"THE COURT: I did. I declined to so instruct the jury, but I say before I declined to so instruct the jury no evidence was tendered on that issue in behalf of the defendant.

"MR. BUSHNELL: That does not affect the fact that the Government is obliged to prove every essential element of the crime charged, and this Christoffel case states, Your Honor, that the existence of a competent tribunal is an essential element.

"THE COURT: I think I get your point.

"MR. BUSHNELL: If I am not clear on that I wish Your Honor would stop me."

And again at page 34 where the Court says:

"True, a denial of petition for writ of certiorari is not equivalent to an affirmance of the judgment. The Supreme Court has stated so time and time again. Nevertheless, it seems to the Court inconceivable that the Supreme Court would have denied certiorari if it held that the point of no quorum had a sound foundation. Or, it may be that the Supreme Court changed its view between the denial of the petition in the *Meyers* case and the decision in the *Christoffel* case. But perhaps this Court should not speculate on what was intended by the Supreme Court in denying the writ of certiorari in this case."

13. Petitioner, by the proceedings which have resulted in his present confinement, has been deprived of his Constitutional right to a trial by jury and of the equal protection of the law and of due process of law—all guaranteed to him by the Constitution of the United States, in that the Trial Court refused to permit the Jury to pass upon a question of fact which was an essential element of the statutory crime of which he was accused, i.e., whether or not the "tribunal" before which the alleged perjury was said to have been committed was, as a matter of fact, a competent tribunal before which the alleged offense might be committed.

14. This petition presents only questions of law and, therefore, it is unnecessary for the Court to require the

Respondent to produce the body of Petitioner in the event that the Court issues an order directing the Respondent to show cause why the writ should not be granted.

27 15. This petition is filed under Title 16 of Chapter 8, Section 801 of the District of Columbia Code and not under Section 2241, Title 28, U. S. C. or Section 2255 of Title 28 of the United States Code.

16. The record of the proceedings in the Trial Court is not appended for the reason that the same has been transmitted and is a part of the records of the United States Court of Appeals for the District of Columbia in the case of *Bennett E. Meyers, Appellant, v. United States of America, Appellee*, No. 10,367.

17. On the 13th day of July, 1949 and on the 23rd day of August, 1949 petitions for writs of habeas corpus were filed by this same Petitioner in the United States District Court for the Eastern District of Virginia, such having been dismissed, for lack of jurisdiction, respectively on the 15th day of July, 1949 and on the 14th day of September, 1949, upon the ground, in respect of the first such petition that, under Section 2255 of Title 28 of the United States Judicial Code, such could not be entertained by the Court until a motion to vacate sentence had been first filed with the sentencing court and, in respect of the second such petition for writ of habeas corpus, upon the ground that the remedy afforded by Section 2255 of the Judicial Code was adequate and effective to test the legality of Petitioner's detention. The United States District Court for the Eastern District of Virginia, in these two proceedings, did not pass upon the merits of the questions herein presented by this petition.

18. Attached hereto and made a part hereof, by reference, is a true and correct copy of the Commitment of the United States District Court for the District of Columbia, by which the Petitioner has been and is being deprived of his liberty.

28 19. This Petition is verified by Counsel rather than by Petitioner because Petitioner, being incarcerated at Lorton, Virginia, is not available in the Dis-

trict of Columbia to personally make such verification.

WHEREFORE, Petitioner prays that a writ of *habeas corpus* be issued to Donald Clemmer as Director of the Department of Corrections of the District of Columbia and that Petitioner may be discharged from the said unlawful imprisonment and unlawful judgment and sentence, and that the judgment of conviction and the Petitioner's commitment be declared null and void and Petitioner be discharged and restored to his liberty.

/s/ Robert T. Bushnell
 Robert T. Bushnell
 1406 "G" Street, N. W.
 Washington, D. C.
 - and -
 521 Fifth Avenue
 New York 17, New York
 /s/ Stanley Suydam
 Stanley Suydam
 /s/ John O. Dahlgren
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 1406 "G" Street, N. W.
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Attorneys for Petitioner.

Dahlgren, Darragh & Close,
 Of Counsel.

* * * *

30

DISTRICT COURT
 OF THE UNITED STATES
 FOR THE DISTRICT OF COLUMBIA

United States of America

v.

Bennett E. Meyers

No. 1414-47

On this 15th day of March, A. D., 1948 came the Attorney for the Government and the Defendant appearing in person and by Counsel, Messrs. Robert Bushnell and Russell Hardy,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Vio. Sec. 2501, Title 22, District of Columbia Code as charged in Counts 2, 4, and 6, and the Court having asked the Defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the Defendant is guilty as charged and convicted.

IT IS ADJUDGED that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty (20) months to Five (5) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the Defendant.

Alexander Holtzoff (signed)
United States District Judge

31 Filed Oct 14 1949 Harry M. Hull, Clerk

Motion to Dismiss

Comes now the respondent in the above entitled case and by his attorney, the United States Attorney, moves this honorable court to dismiss the petition for habeas corpus filed herein for the reason that this court is without jurisdiction of the subject matter and for the additional reason that the petition fails to state a cause of action upon which relief may be granted.

/s/ George Morris Fay
George Morris Fay
United States Attorney
/s/ Ross O'Donoghue
Ross O'Donoghue
Assistant United States
Attorney

* * * *

32 Filed Oct 24 1949 Harry M. Hull, Clerk

Order

This case having come on to be heard upon respondent's motion to dismiss the petition for habeas corpus, and it appearing to the Court that petitioner has heretofore applied to this Court, under the provisions of Section 2255 of Title 28, U. S. Code, to set aside and vacate a judgment of conviction, and that ~~accordingly this Court is without jurisdiction to entertain an application for a writ of habeas corpus since~~ it is not alleged nor does it appear that the remedy by motion is inadequate or ineffective to test the legality of his detention, it is by the Court this 24 day of October, 1949.

ORDERED, that the motion to dismiss the petition is hereby granted and the petition is hereby dismissed.

/s/ Alexander Holtzoff
Judge

* * * *

33 Filed Oct 27 1949 Harry M. Hull, Clerk

Notice of Appeal

Name and Address of Appellant:

Bennett E. Meyers
No. 12924
c/o Lorton Reformatory
Lorton, Virginia

Name and Address of Appellant's Attorneys:

Stanley Suydam
1406 "G" Street, N. W.
Washington 5, D. C.
John O. Dahlgren
1406 "G" Street, N. W.
Washington 5, D. C.

Offense:

Subornation of perjury in violation of
Section 22-2501 D. C. Code.

Statement of Judgment or Order, Giving Date, and any
sentence:

Date of Judgment, March 15, 1948 — 20 months to five
years imprisonment.

34 The judgment or Order appealed from is the
Order of the United States District Court for the
District of Columbia made on the 21st day of October, 1949
and entered on the 24th day of October, 1949 dismissing
the Petition for *Habeas Corpus*."

Name of Institution where now Confined, if not on
Bail:

Lorton Reformatory,
Lorton, Virginia.

I, the above-named Appellant, hereby appeal to the
United States Court of Appeals for the District of Co-
lumbia from the above-stated Order.

/s/ Bennett E. Meyers
Bennett E. Meyers
Appellant

/s/ Stanley Suydam
Stanley Suydam
Attorney for Appellant
1406 "G" Street, N. W.
Washington 5, D. C.

DAHLGREN, DARRAGH & CLOSE,
Of Counsel.

October 27, 1949
Date

* * * *

37 No. 3587 District Court of the United States
 for the District of Columbia—
 Habeas Corpus

Parties	Petitioner's	Respondent's
Bennett E. Myers	Attorney	Attorney—
Donald Clemmer, Director	Robert Bushnell	George Morris Fay
Department of Corrections	Stanley Suydam	Ross O'Donoghue
	John O. Dahlgren	

Date	Proceedings	Deposits	Fees	Total
1949				
Oct. 5	Deposit for costs by Suydam	10	10	10
" "	Petition Post. App. &c.			
" "	Order for Rule to issue Schweinhaut Served 10/6/49			
" "	Rule to Show Cause Returnable 10 days after Service			
" "	Add. deposit for costs by Suydam	1	1	1
" 14	Motion of respondent to dismiss; P&A, mailed 10/14/49. App. George Morris Fay & Ross O'Donoghue, Mc 10/14/49.			
" 21	Order discharging writ, dismissing petition and remanding petitioner, to be presented. Holtzoff, J.			
" 24	Order dismissing petition. Holtzoff, J.			
" 27	Notice of Appeal. (Copy to U. S. Atty.)			
" "	Add. deposit for costs by Suydam	5	5	5
" 28	Designation of Record & certif. of service			
Nov. 4	Transcript of proceedings (2) vol. 1, pp. 1-18 filed			

* * * *

2

Proceedings

THE DEPUTY CLERK: In re the hearing of
Bennett E. Meyers.

MR. O'DONOGHUE: If Your Honor please, we shall
make a motion to dismiss. I think it might be appropriate
if we hear that first.

THE COURT: I think I know the motion.

MR. BUSHNELL: May the petitioner, General
Meyers, be produced? I understand he is in the court-
house downstairs, in the custody of the Court.

THE COURT: Proceed.

MR. O'DONOGHUE: I didn't know he was here.

THE COURT: What was your motion?

MR. O'DONOGHUE: I think Your Honor probably guesses what the motion is based on.

THE COURT: Where is the defendant confined?

MR. O'DONOGHUE: The defendant is confined in Lorton Penitentiary, at Lorton, Virginia.

THE COURT: Of course the Court of Appeals held last year that this Court may not issue a writ of habeas corpus in respect to a person confined either in Occoquan or Lorton. That was really an overruling of not only a prior line of cases, but of the practice, but if the defendant is now physically present in this District—

MR. BUSHNELL: That is right.

3 THE COURT: Then I think that point falls.

How is it that he was brought here?

MR. O'DONOGHUE: I don't know that, Your Honor. It was originally set the other day.

THE COURT: I beg your pardon?

MR. O'DONOGHUE: It was originally set for Monday.

MR. BUSHNELL: He was here then.

MR. O'DONOGHUE: He was brought here then. I was somewhat surprised.

THE COURT: He is here. Therefore the writ lies, although I don't think he should have been brought here.

MR. O'DONOGHUE: I certainly don't either.

THE COURT: Because until the writ of habeas corpus issues, the defendant in custody should not be produced before the Court.

MR. O'DONOGHUE: No, Your Honor, that is true. I inquired why he was brought here. They said they thought there had been some order he be produced, but the order does not say that. I pointed that out and suggested that he not be kept here, but he was.

THE COURT: He is here, and technically he will be able to sign a petition right now and apply to me for a

writ of habeas corpus. There is no purpose to go through the unnecessary circumlocution in having him sign a petition here. He is here now. Therefore, I think your objection is moot.

4 MR. O'DONOGHUE: Very well, Your Honor.

There is another basis to that motion, however. That is under 2255, Title 28.

The last paragraph of that section provides that application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained if it appears that the prisoner failed to apply for relief by motion to the Court that sentenced him, or that such Court has denied him relief, unless it appears that the remedy by motion is inadequate or ineffective to test the legality of his contention.

Your Honor will remember an application for correction of sentence was made by the petitioner here in last July and was heard by Your Honor, and all the matters involved in the present petition were then disposed of, and there has been no new allegation that the remedy by motion was inadequate or ineffective to test the legality of his contention.

Your Honor will remember you went not only, as you said, into the technical side of it, but to the merits as well.

THE COURT: I recall.

MR. O'DONOGHUE: Since no allegation is made that was inadequate or ineffective under the provisions of this section of the title, the petition for habeas corpus should not be entertained.

5 THE COURT: I haven't got a copy of the Code here. May I have yours?

I will hear you on your preliminary objection, then, before going into the merits.

Mr. Bushnell?

MR. BUSHNELL: I want it noted the petitioner, Bennett E. Meyers is here physically present now in the

courtroom, and is demanding his liberty here in the District of Columbia at this moment.

THE COURT: There is no question about that, so that the first objection made by the Government is overruled.

MR. BUSHNELL: The next is that Section 2255 which was argued before you last summer, July 22nd, to be exact and then and there denied was brought under the Federal Code, under the National Code, that you now in hearing this petition are sitting as a local Judge of the District of Columbia, the District Court, sitting not in the capacity of a District Court sitting as one in another State, that the District of Columbia has a definite, specific and separate body of laws, quite as separate when they have not been superseded, and there is no contention that this has, from the national, Federal Code, as any other State in the Union.

2255, containing the prohibition authority was a constitutional—I will not direct myself to that issue at the moment or at any time in this hearing—it has no application whatsoever to the body of laws of the District
6 of Columbia. It is not contained in the new revisions with the Federal Code. It has no reference whatever to the Federal Code.

Now, this petition is brought under the terms of the District of Columbia Code which was enacted by Congress in its capacity as a legislative body for the District of Columbia, locally, Section 801, Title 16, and I want to read it, because in some ways it is unique.

If it were pertinent, you could compare it to the Federal Code, which is much more restricted, but, at any rate, the District of Columbia Code reads as follows:

“Any person committed, detained, confined or restrained from his liberty within the District under any color or pretense whatever or any person in his or her behalf may apply by petition to the District Court of the United States for the District of Columbia or any Justice thereof for a writ of habeas corpus to the end that the

cause of such commitment, confinement or restraint may be inquired into, and the Justice applied to"—

that is an objection I raised the other day to it having been referred out to Your Honor, that we have the specific right to apply to any Judge of the District and this application was directed to the Chief Justice and the Justice applied to as the Court or the Justice applied to.

7 "—if the facts set forth in the petition make out a prima facie case"—

And so forth and so on.

Now, the District of Columbia Code confers certain rights upon the person described, and the question then becomes on this petition who is Bennett E. Meyers? Is he one of the persons to whom Congress in its local legislative capacity gave these rights?

Now, immediately, of course, the question was raised in regard to the McAfee case, and that is out.

I wish to refer, however, to the case of Ahrens v. Clark, which the very brief decision in the McAfee case refers to, a per curiam decision in a couple of paragraphs refers to, because it is in direct support of our petition.

First of all, there isn't any question, I take it, that Bennett E. Meyers was committed here in the District of Columbia.

Now, the Court has no more right to read anything into that statute that isn't there than it has to write a statute. The Court in the making of rules and the conduct of its practice, there are some restraints upon it, and those are restraints under the American system imposed by the legislature. And there are definite restraints here. Actu-

8 ally that section reads, in effect, any person committed in the District of Columbia, here locally, detained in the District of Columbia, confined in the District of Columbia. Each one of those separate words, therefore—I have inserted the obvious meaning—is separated by the comma.

THE COURT: Mr. Bushnell, I don't think there is any doubt this defendant comes within Section 801.

MR. BUSHNELL: All right.

THE COURT: Because he is here in the District of Columbia, he is being restrained of his liberty in the District of Columbia.

MR. BUSHNELL: Then if there is no doubt about that, the question becomes whether or not this writ should be granted, and he should be—

THE COURT: No, before I hear the matter on the merits, I want to say the Government made two objections, and I overruled the first one.

MR. BUSHNELL: Yes.

THE COURT: You needn't trouble yourself to argue that, but the second preliminary objection is that Section 2255, Title 28 of the United States Code bars an application for habeas corpus in view of the fact that the defendant has made a motion under that section and the motion has been denied. That is what the objection is based on. I can hear you as to that.

MR. BUSHNELL: Whether the defendant made
9 a motion under that section is utterly immaterial. It is stated in Section 1. It does not say if a defendant should happen to make a motion under that section he is estopped from asserting his rights that are given him under a different body of laws in a different jurisdiction. It would no more prevent this defendant, this petitioner, General Meyers, from bringing a petition in the District of Columbia than it would prevent him from bringing a petition in the State of Massachusetts or New York if he happened to be there.

THE COURT: I want to make sure whether I understand your point correctly. I think I do. Is it this: that the last paragraph of 2255 does not apply to this because this Court sits as a local Court in the District of Columbia as well as a Court of the United States? Is that it?

MR. BUSHNELL: The point is that Chapter 133, as

it is now, Title 28, 2241 through 2255 is the Federal Code, that it make no reference to, does not purport to amend or to change the local body of laws in the District of Columbia at all; that you can't read fairly, legally, such a construction into it, because it is absent. If that Federal Code in that arrangement and with that wording had intended to supersede the District of Columbia Code, it would have had to so state. You cannot repeal a body of laws without such reference, and there can't be any question. It is that Code. It is 2241 to 2255. It is Title 28 of the United States Code.

10 We are proceeding under an entirely different volume. We are proceeding under a set of laws. It is entitled the District of Columbia Code, 1940 Edition, and a careful running of it down shows no effect—

THE COURT: Section 801 is still law.

MR. BUSHNELL: And how can it possibly be argued that this volume, Title 28, United States Code, has any effect whatsoever on the local Code? That is still law.

Now, going one step further, Meyers was indicted under the local Code, as you well recall. We happened to contend that it ought not to be have been. We were overruled by you and by the Court of Appeals.

THE COURT: He was indicted for the crime of subornation of perjury, and it is punishable by both Codes.

MR. BUSHNELL: He was indicted under the terms of the District of Columbia Code. He was convicted under that Code. The Court of Appeals affirmed the conviction and said that he was a District of Columbia Code violator and that the indictment was proper.

He has been continuously since his commitment a prisoner of the District of Columbia, first in the District of Columbia Jail, subsequently in the District of Columbia reformatory at Lorton, and now and since Monday, at least, and today he is still a prisoner, this time of the Court sitting as a District Court Judge of the Dis-

11 trict of Columbia administering that body of laws.

THE COURT: I think the Court gets your point.

MR. BUSHNELL: Well, I have heard you say that before, Your Honor.

THE COURT: I get the point. Whether I agree with it is a different proposition, but I understand the point you are driving at.

MR. BUSHNELL: I say you can't do anything else than to consider this under the District of Columbia Code. Here he is. He has been indicted, convicted and held as a District of Columbia prisoner under that Code alone. There is not a single case in the books anywhere. There are many cases that I can cite you. I didn't bring them. They are so fundamental. I am sure you will agree that the body of local laws of the District of Columbia is a separate body of laws that in some instances overlap, but that in general it is a separate local body of laws for local Government.

Now, it is untouched by 2255. It is untouched by any provision in the United States Code.

I don't say that Congress could not have said, "This shall apply to the District of Columbia," but it did not, sir, and not having done so, 801, as you state, is still law, unamended by anything.

Do you wish me to proceed?

THE COURT: Well, no, I am going to dispose
12 of the preliminary objections before you proceed,
before entering upon a discussion of the merits, so
I will hear the other side on the preliminary objection if
you have completed your argument on the preliminary
objection.

MR. BUSHNELL: Just to make sure, apparently you agree with my contention in the other respect as to how Meyers being here alters the jurisdiction.

THE COURT: There is no question about that. This Court has jurisdiction over the person, because is immaterial how the defendant has been brought here. He is in the District of Columbia, and therefore I repeat again I overrule the first objection raised by the Government.

Now, I will hear the Government on the second question.

MR. O'DONOGHUE: If Your Honor please, it seems to me that perhaps counsel has attempted to import into the law for the District of Columbia a dichotomy that does not in fact exist, that there is not that distinction between the two laws nor that distinction between the two capacities of the Court.

The Supreme Court a number of years ago in the case of *O'Donoghue v. United States*, 289 U. S. 516 held that these were United States District Courts and the Judges of these Court were United States District Judges.

2255, Title 28 is of general application. It does not say
13 no petition for habeas corpus may be entertained
under the Federal statutes. It says no application
for habeas corpus may be entertained, and that law
is certainly applicable to the District of Columbia as well
as to any other Federal jurisdiction.

Furthermore, the Court of Appeals and the Supreme Court have never considered that there was any real distinction between the habeas corpus law in the District of Columbia Code and the provisions for application for habeas corpus in the Federal Code of laws, so that in *Ahrens against Clark*, which has been cited by Mr. Bushnell, decided in June of 1948 by the Supreme Court at 335 U. S. 188, the Court there pointed with—

THE COURT: What case?

MR. O'DONOGHUE: *Ahrens against Clark*.

THE COURT: Yes.

MR. O'DONOGHUE: Pointed with approval to the old District of Columbia case of *McGowan against Moody*, which is in 22 Appeals D. C., and in *McGowan v. Moody* the application for habeas corpus was brought under the local statute and it was set out, in fact, in verbatim et litteratim by the Court.

Again in the case of *McAffee against Clemmer* and *Butler against Clemmer*, in which the Court of Appeals affirmed on the basis of the case of *Ahrens against Clark*,

the Court said in each case that—rather, the Court in
 neither case made any distinction between an appli-
 14 cation under the local law and under the Federal
 law, and, as a matter of fact, in the McAfee case
 it was decided the same day as the Butler case, and which
 were reported one after another in the reports, in one
 instance the application was made under the Federal law
 and in the other instance it was made under the Federal
 and local law, so that no distinction has been made as to
 application for habeas corpus in this jurisdiction.

MR. BUSHNELL: I just wish to call Your Honor's
 attention to one thing. In *Ahrens v. Clark*, I would be
 glad to discuss it in detail, that was construing the Federal
 Code only, and, furthermore, that case was decided in
 June, 1948, before the provisions of 2255.

THE COURT: I am not going to dispose of this mat-
 ter on the basis of *Ahrens* against *Clark*. I don't think
 that decision should govern in this matter.

The law regulating the issuance of writs of habeas
 corpus in the District of Columbia is found in Section
 801 of Title 16 of the 1940 District of Columbia Code.
 That is a general statute providing for the issuance of
 writs of habeas corpus. In essence it corresponds to a
 similar provision of Title 28 of the United States Code
 found in Section 2241, which permits writs of habeas
 corpus to be granted by the District Courts as well as
 other Federal courts.

The United States District Court for the District of
 Columbia is as much a Federal court as any other
 15 United States District Court. It has the same
 powers.

This becomes apparent, if any authority is needed, by
 an examination of Section 88 of Title 28. In Section 88
 the District of Columbia is named as one of the 85 judicial
 districts into which the continental United States is di-
 vided.

The question, then, is whether the limitations of Section 2255 of Title 18 are applicable in the District of Columbia or are limited to the other 84 districts.

Title 28 is an Act of Congress of general application. There are no inconsistencies as the Court sees it, between Section 2255 of Title 28 and Section 801 of Title 16 of the District of Columbia Code. The last paragraph of Section 2255 is a limitation on the issuance of writs of habeas corpus, and that limitation applies to every Federal court. I see no basis for concluding that the District of Columbia is excluded from the application of that paragraph.

Now, that paragraph provides that an application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion under Section 2255 shall not be entertained if it appears that the applicant has failed to apply for relief by motion to the Court who sentenced him, or that such Court has denied him relief, unless it so happens that the remedy by motion is inadequate or ineffective to test the legality of his detention.

This matter was before me several months ago
16 on a motion under Section 2255. This Court denied relief. The Court feels that the remedy by that motion is not inadequate or ineffective. Therefore the Court feels that the present application is barred under that statute.

Now, the Court realizes that there is a certain incongruity here as compared with the Christoffel case.

MR. BUSHNELL: I couldn't hear you.

THE COURT: The Court realizes that there is a certain incongruity in this case as compared with the Christoffel case. The Court realizes that. And it was pointed out in the minority opinion, in a footnote, I believe, in the minority opinion in the Christoffel case.

Nevertheless, the Court feels it is powerless to deal with the matter. The conviction has been affirmed by the Court of Appeals. The Supreme Court denied a petition

for certiorari. Later on, in a later decision, because the Christoffel case came later, the Court announced a different principle of law. I think this Court has lost jurisdiction to deal with the matter, and if the Christoffel case applies, the Court is powerless to deal with the situation.

Now, it may be said in the Christoffel case the Supreme Court changed the preexisting law. If it did, then surely his conviction should not be set aside.

I am going to deny the writ because I feel I am without jurisdiction to grant it, or, rather, have no power
17 to grant it in the light of the last paragraph of Section 2255.

MR. BUSHNELL: I just call Your Honor's attention again, so that I won't miss anything in attempting to show you how wrong you are, you will notice—

THE COURT: The Court realizes that you are not a member of this bar. It is not customary for members of this bar to say to the judge, "I will show you how wrong you are."

MR. BUSHNELL: I don't expect to be able to.

THE COURT: I don't think—

MR. BUSHNELL: I will withdraw that remark, Your Honor.

I now move that this petitioner be admitted to bail pending his appeal in the Criminal Case 141-47. I also move that he be admitted to bail on the present case, the present petition, and I move that he be admitted to bail on the ground that there are serious and substantial questions of law presented by these appeals and that there can not be any doubt about it in view of what Your Honor ruled on 2255 and the clear wording of the Federal Code.

* * * *

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,468

BENNETT E. MEYERS, APPELLANT,

v.

DONALD CLEMMER, DIRECTOR, DEPARTMENT OF CORRECTIONS,
DISTRICT OF COLUMBIA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JAN 16 1950

Joseph W. Stewart

CLERK

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,468

BENNETT E. MEYERS, APPELLANT,

v.

DONALD CLEMMER, DIRECTOR, DEPARTMENT OF CORRECTIONS,
DISTRICT OF COLUMBIA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

COUNTER-STATEMENT OF THE CASE

This is an appeal from the denial of a petition for habeas corpus. The court below held that it was without jurisdiction to entertain an application for habeas corpus since motion had been previously made and denied to vacate and set aside a judgment of conviction under the provisions of Section 2255, Title 28, United States Code, since there had been no showing that the hearing on that application was not adequate or effective to test the legality of his detention.

By order of this Court, dated December 16, 1949, the appeal in this case was consolidated for argument with *Meyers v. United States*, No. 10,367. Before granting of this motion, briefs had been filed in the former case, but no brief had been filed by appellee in the latter. For the most part, the two cases involve identical questions of whether or not a collateral attack may be made on appellant's conviction either under the provisions of Section 2255, Title 28, United

States Code by motion to vacate and set aside a judgment of conviction or by habeas corpus. Since appellee's brief in No. 10,367 proceeded on the theory that the right to relief under either remedy depended on precisely the same principles and attempted to demonstrate that appellant was not entitled to relief under either type of application, it seems unnecessary to cover the same ground here. In short, if habeas corpus were available to appellant, that brief maintains that he has not made a showing that would entitle him to it.

But the court below held that under the provisions of Section 2255, Title 28, U. S. Code, it could not entertain appellant's petition for habeas corpus.

STATUTES INVOLVED

Sec. 2255. Federal custody; remedies on motion attacking sentence:

A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Sec. 88. District of Columbia.

The District of Columbia constitutes one judicial district.

Court shall be held at Washington.

Sec. 451. Definitions.

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the district courts of the United States for the districts of Hawaii and Puerto Rico, the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any Court created by Act of Congress the judges of which are entitled to hold office during good behavior.

Title 16, Sec. 801 [24: 201]. Petition—Sufficiency—Issuance of writ by court or justice.

Any person committed, detained, confined, or restrained from his lawful liberty within the District, under any color or pretense whatever, or any person in his or her behalf, may apply by petition to the District Court of the United States for the District of Columbia, or any justice thereof, for a writ of habeas corpus, to the end that the cause of such commitment, detainer, confinement, or restraint may be inquired

into; and the court or the justice applied to, if the facts set forth in the petition make a *prima facie* case, shall forthwith grant such writ, directed to the officer or other person in whose custody or keeping the party so detained shall be, returnable forthwith before said court or justice. (Mar. 3, 1901, 31 Stat. 1372, ch. 854, § 1143.)

Cross Reference

Special proceedings for commitment or discharge of feeble-minded persons do not abridge right to petition for writ of habeas corpus, § 32—618.

QUESTION PRESENTED

1. Whether the provisions of the last paragraph of Sec. 2255 of Title 28, U. S. Code, forbid the entertainment of an application for habeas corpus under the provisions of Sec. 2501, Title 22, D. C. Code (1940) when the sentencing court has denied him relief upon his motion to set aside his sentence where that procedure has been adequate and effective to test the legality of his detention.

SUMMARY OF ARGUMENT

Sec. 2255 of Title 28, U. S. Code, is a statute of general application to Courts of the United States including the District of Columbia and is alike applicable to petitions for habeas corpus under the United States Code as well as under the District of Columbia Code. Since that Section forbids the entertainment of applications for habeas corpus where petitioner has previously applied for relief under that section as appellant has done, the lower court properly refused to entertain petition for habeas corpus although nominally brought under the District of Columbia Code.

ARGUMENT

Appellant's theory is that Sec. 2255 of Title 28, United States Code, can have no application to his petition for habeas corpus since he asks for that relief not under the United States Code but under the District of Columbia Code. He contends that since the habeas corpus provisions of the D. C. Code are still in effect and unrepealed, they are always

available no matter what restrictions of general application Congress may have imposed.

Appellee, of course, does not contend that the habeas corpus provisions of the District of Columbia Code have been repealed, but merely that the restrictions on the availability of habeas corpus imposed by Congress are equally applicable to the granting of that relief by Courts of the United States under whatever statute it may be sought.

There can be no doubt that the Courts of the District of Columbia are Courts of the United States. Title 28, U. S. Code, Sec. 88, Title 28, U. S. Code, Sec. 451; *O'Donoghue v. United States*, 289 U. S. 516. By its opening sentence, Title 28, U. S. Code, Sec. 2255 is made applicable to Courts of the United States. Accordingly, it follows that the restriction contained in that section applies to the United States District Court for the District of Columbia. Appellant concedes that neither of the habeas corpus provisions of the two Codes are opposed to the other. Under such circumstances "where the statutes can reasonably be reconciled, both must be given effect." *U. S. ex rel. Welch v. Farley* (D. C., D. C. 1937) 18 F. Supp. 75, 77.

This Court has passed upon the same point in *Nichols et al. v. United States*, 69 App. D. C. 120, 121, 99 F. 2d 353, holding that an Act of Congress of general application should where possible be given an harmonious interpretation with those of local effect so that both may be given effect. This court said:

"The Espionage Act is a general statute of the United States, and by its terms (Sec. 632) is applicable to all territory subject to the jurisdiction of the United States. Every general statute of the United States not inapplicable in the District of Columbia and not inconsistent with some local law applies in the District with the same force and effect as elsewhere. Sec. 1640, D. C. Code 1924, Title 1, Sec. 21, Code 1929. There is nothing in the Espionage Act which makes it inapplicable in the District of Columbia. In language which is general in form and application, it authorizes a search warrant where property is 'used as a means of committing a felony,' but this fact does not render it locally

inapplicable or make it inconsistent with the statute local to the District which authorizes the issuance of a search warrant by a police judge in sundry cases, including the case of property used for gambling purposes. In *Page v. Burnstine*, 102 U. S. 664, 26 L. Ed. 268, it was held that a general statute of the United States is applicable to the District of Columbia notwithstanding there is a special statute covering the same subject. We think that where local statutes make no provision for the issuance of search warrants, the Espionage Act is as applicable in the District of Columbia as in other places under federal jurisdiction; and where a local statute does, as in this case, make such a provision, the Espionage Act is concurrent and cumulative. By its terms (Sec. 633) the act provides that nothing in it shall be held to repeal or impair existing provisions of law regulating search and seizure. Cf. *Hysler v. United States*, 5 Cir., 86 F. 2d 918, 919.

"There is nothing in *Kleindienst v. United States*, 48 App. D. C. 190, in conflict with our holding in this respect. In that case Congress had provided a different measure of punishment for adultery in the District of Columbia and other places within the jurisdiction of the United States, such as arsenals, forts, etc. We held that, because the local law was in conflict with the general law, the former was exclusively applicable in the District. But, as we have said, there is no such conflict here. The two statutes exist side by side and form together a cumulative provision on the subject of searches in the District of Columbia."

It has even been held that laws of local application . . . must give way, if indeed they are not modified by laws enacting the broad and wholesome policies of Congress relating to veterans' affairs. *First Nat. Bank of Colorado Springs, Colo., v. United States* (D. C., D. C. 1939) 30 F. Supp. 730, 731. Cf. *Sims v. Rives*, 66 App. D. C. 24, 84 F. 2d 871.

There is thus no suggestion that the two statutes cannot be given an harmonious interpretation simply by entertaining or refusing to entertain petitions for habeas corpus.

Prior motion to vacate sentence of conviction adequately and effectively tested legality of detention

Appellant, nevertheless, contends that the remedy provided by Section 2255 of Title 28, United States Code, was inadequate and ineffective and therefore urges that habeas corpus is now available. His basis for this contention is to be found in two sentences of the opinion of Judge Holtzoff:

“The Court is of the opinion, therefore, that it has no power under Section 2255 of Title 28, or any other provision of law, to set aside the judgment. The Court is of the opinion that it has lost jurisdiction over it.” (App. 11).

Appellant's rather ingenious argument is, therefore, that if the court was without jurisdiction, it could provide no remedy and certainly no adequate or effective test of the legality of his detention. But ingenious as the argument may be, even slight analysis shows it to be specious. The language of the court has been taken out of its context to achieve the distorted impression that the court considered itself without jurisdiction to entertain the motion. Clearly, it did have jurisdiction in the sense that Section 2255 undoubtedly confers it upon the court which imposed the sentence. A fair reading of the opinion, moreover, makes it plain that the court recognized that it had such jurisdiction and, accordingly, gave the most careful scrutiny to appellant's application. It is manifest that what was meant by Judge Holtzoff in saying that the Court had lost jurisdiction over the judgment was simply that since there was no question but that the trial court had the jurisdiction to try and convict appellant, the judgment was impregnable to collateral attack and could not be disturbed. Obviously, this is quite different from saying that the court was without jurisdiction to entertain the motion nor did the court say this. But only if it had, would there be any possible basis for the subsequent habeas corpus proceeding in the jurisdiction where appellant is imprisoned. It must follow that there is no basis for appellant's contention, and in fact, the proceeding, under Section 2255 of Title 28, was adequate

and effective to test the legality of appellant's detention.

This same point was raised by appellant in the Fourth Circuit. Claiming that his application to vacate sentence had been inadequate and ineffective to test the legality of his detention, he petitioned the United States District Court for the Eastern District of Virginia for habeas corpus which the court denied for the same reasons as did the court below in this case. An appeal was taken to the Court of Appeals for the Fourth Circuit which similarly rejected the contention in its decision of January 13, 1950 (not yet reported).

CONCLUSION

Accordingly, the decision of the District Court should be affirmed.

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